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March 15, 2004

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Hon. Deborah Taylor Tate
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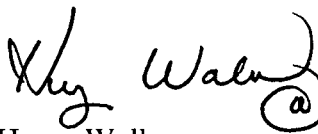
Re: Implementation of the Federal Communications Commission's
Triennial Review Order (Nine –Month Proceeding) (Loop and Transport)
Docket 03-00527

Dear Chairman Tate:

Enclosed please find non-proprietary Rebuttal Testimony of James C. Falvey on behalf of Xspedius Communications, LLC.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/pp

BEFORE THE TENNESSEE REGULATORY AUTHORITY

In Re:)	
)	
Implementation of the Federal Communications)	
Commission's Triennial Review Order (Nine)	
Month Proceeding) (Loops and Transport))	Docket No 03-00527
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REBUTTAL TESTIMONY OF
JAMES C. FALVEY
ON BEHALF OF
XSPEDIUS COMMUNICATIONS, LLC

MARCH 15, 2004

1 **Q. PLEASE STATE YOUR FULL NAME, TITLE AND BUSINESS**
2 **ADDRESS.**

3 A My name is James C Falvey. I am the Senior Vice President of
4 Regulatory Affairs for Xspedius Communications, LLC. My business
5 address is 7125 Columbia Gateway Drive, Suite 200, Columbia, Maryland
6 21046.

7
8 **Q. ON WHOSE BEHALF ARE YOU TESTIFYING IN THIS**
9 **PROCEEDING ?**

10 A. I am testifying for Xspedius Communications, LLC, on behalf of its
11 Tennessee operating subsidiaries, Xspedius Management Co. Switched
12 Services LLC and Xspedius Management Co. of Chattanooga LLC
13 ("Xspedius").

14
15 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND**
16 **AND PROFESSIONAL EXPERIENCE.**

17 A I am a *cum laude* graduate of Cornell University, and received my law
18 degree from the University of Virginia School of Law. I am admitted to
19 practice law in the District of Columbia and Virginia.

20 After graduating from law school, I worked as a legislative
21 assistant for Senator Harry M. Reid of Nevada and then practiced antitrust
22 litigation in the Washington D.C office of Johnson & Gibbs Thereafter, I
23 practiced law with the Washington, D C. law firm of Swidler & Berlin,

1 where I represented competitive local exchange providers and other
2 competitive providers in state and federal proceedings. In May 1996, I
3 joined e spire Communications, Inc. as Vice President of Regulatory
4 Affairs, where I was promoted to Senior Vice President of Regulatory
5 Affairs in March 2000.

6 Currently, I am the Senior Vice President of Regulatory Affairs for
7 Xspedius Communications, managing all matters that affect Xspedius
8 before federal, state, and local regulatory agencies. I am responsible for
9 federal regulatory and legislative matters, state regulatory proceedings and
10 complaints, and local rights-of-way issues.

11
12 **Q. HAVE YOU TESTIFIED BEFORE THE TENNESSEE OR OTHER**
13 **STATE PUBLIC SERVICE COMMISSIONS?**

14 **A.** Yes. I have testified previously in Tennessee on local competition issues
15 In total, I have testified before 14 public service commissions on, among
16 other issues, interconnection, resale, and reciprocal compensation,
17 including in Alabama, Florida, Georgia Kentucky, Louisiana, Mississippi,
18 North Carolina, South Carolina, New Mexico, Texas, Pennsylvania,
19 Arkansas, and Kansas

20
21 **Q. PLEASE DESCRIBE THE TYPE OF SERVICE XSPEDIUS**
22 **PROVIDES IN TENNESSEE.**

1 A. Xspedius is a facilities-based telecommunications service provider that
2 also provides service to customers through unbundled network elements
3 leased from BellSouth. Xspedius currently offers service in Chattanooga,
4 Memphis, and Nashville. Xspedius provides a wide variety of complex
5 integrated local, long distance, and Internet services to sophisticated
6 business customers, including Xspedius Complete Access, its flagship
7 integrated T-1 product

8
9 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

10 A The purpose of my testimony is to rebut the Direct Testimony of Shelley
11 W. Padgett and the Direct Testimony of Aniruddha (Andy) Banerjee,
12 Ph D. BellSouth has presented – or is presenting – a direct case based
13 upon facts and findings from ivory tower expert reports and witnesses, but
14 is steadfastly avoiding the real-world evidence that Competitive Local
15 Exchange Carriers (“CLECs”) such as Xspedius have presented to it in
16 their responses to discovery requests agreed-upon in advance by BellSouth
17 and several competitive carriers. This real-world evidence is precisely the
18 evidence that the FCC has asked the state commissions to review in its
19 recent Triennial Review Order (“TRO”) The evidence that BellSouth has
20 presented is completely inconsistent with the real-world evidence that
21 BellSouth had at its disposal when it filed its testimony. As I discuss
22 below, in its direct testimony, BellSouth has identified Xspedius as a
23 wholesaler and self-provider of loops at all capacity levels (to certain

customer locations) despite Xspedius's statements that it does not
wholesale or self-provide loops in Tennessee. *See* Revised Responses and
Objections of Xspedius Communications, LLC to BellSouth's First Set of
Interrogatories (Nos. 1-13), Response to Interrogatory No 9, *see also*
Responses and Objections of Xspedius Communications to BellSouth
Telecommunications, Inc.'s Subpoena Duces Tecum for Deposition to
Xspedius Communications, Response to Question 6, parts 1 & 2 (Feb 17,
2004). In my testimony, I also explain why it is critical for Xspedius to
have a gradual transition to delisted elements, and why the Tennessee
Regulatory Authority ("TRA") should establish a separate phase of this
proceeding to address transition issues.

**I. XSPEDIUS DOES NOT SELF-PROVIDE OR WHOLESALE
LOOPS IN TENNESSEE**

**Q. DOES XSPEDIUS SELF-PROVIDE LOOPS AS DEFINED IN THE
TRO AT ANY CAPACITY LEVEL TO ANY END USER
LOCATIONS IN TENNESSEE?**

A No. As Xspedius stated in its responses to BellSouth's discovery requests,
Xspedius does not have high capacity loop facilities in Tennessee. *See*
Responses and Objections of Xspedius Communications to BellSouth
Telecommunications, Inc 's Subpoena Duces Tecum for Deposition to
Xspedius Communications, Response to Question 6, parts 1 & 2 (Feb. 17,
2004).

1

2 **Q. DOES XSPEDIUS PROVIDE LOOPS AS DEFINED IN THE TRO**
3 **ON A WHOLESALE BASIS AT ANY CAPACITY LEVEL TO ANY**
4 **END USER LOCATIONS IN TENNESSEE?**

5 A. No. Tracking the definitions in the *TRO*, as more fully explained in the
6 Direct Testimony of Gary Ball, Xspedius is not in the business of
7 providing loops on a wholesale basis at the DS1, DS3, or dark fiber
8 capacity levels. In this rebuttal testimony, I will not elaborate on the
9 appropriate interpretation of the triggers, which is addressed in the Direct
10 Testimony of Gary Ball on behalf of CompSouth.

11

12 **Q. DID XSPEDIUS INDICATE TO BELL SOUTH THAT IT DOES**
13 **NOT WHOLESALE OR SELF-PROVISION LOOPS IN**
14 **TENNESSEE?**

15 A Yes In December 2003, Xspedius filed discovery responses in
16 Tennessee, in which it stated that it does not wholesale loops at any
17 capacity level in the BellSouth region, including in Tennessee. *See*
18 Revised Responses and Objections of Xspedius Communications to
19 BellSouth's First Set of Interrogatories (Nos. 1-13) , Response to
20 Interrogatory No. 9 ("Xspedius Responses") In February 2004, Xspedius
21 also filed discovery responses in which it stated that it does not self-
22 provide high capacity loops in Tennessee at any capacity level *See*
23 Responses and Objections of Xspedius Communications to BellSouth

1 Telecommunications, Inc.'s Subpoena Duces Tecum for Deposition to
2 Xspedius Communications, Response to Question 6, parts 1 & 2 (Feb 17,
3 2004).

4
5 **Q. DID BELL SOUTH AGREE UPON THE QUESTIONS WITH**
6 **SEVERAL CLECS IN ADVANCE?**

7 A Yes, in a brief fit of cooperative spirit, BellSouth, Xspedius and several
8 other CLECs agreed to a series of discovery questions to be propounded in
9 this proceeding

10
11 **Q. DID BELL SOUTH RELY ON DATA OTHER THAN CARRIERS**
12 **DISCOVERY RESPONSES TO SUPPORT ITS CLAIM THAT THE**
13 **TRIGGERS FOR LOOPS ARE SATISFIED?**

14 A. Yes Despite having agreed to discovery requests with CLECs in advance,
15 and having received responses to those requests, BellSouth seems to have
16 chosen to set aside the unpalatable real-world answers and instead rely
17 upon third-party expert reports and witnesses For example, BellSouth
18 relies on the unverified information contained in the GeoLIT Plus report to
19 identify locations where it claims carriers provide loops. BellSouth also
20 relies on general statements on carrier websites instead of specific
21 discovery responses from these same carriers.

22

1 **Q. BUT DOESN'T BELLSOUTH WITNESS PADGETT STATE IN**
2 **HER TESTIMONY THAT BELLSOUTH WOULD REPLY UPON**
3 **GEOLIT PLUS REPORT ONLY WHERE CARRIERS DID NOT**
4 **RESPOND TO DISCOVERY?**

5 A. Yes. Ms. Padgett states that "I have used this data only in instances where
6 a carrier has not provided us with information through discovery." In its
7 discovery responses, Xspedius stated that it does not wholesale or self-
8 provide loops. BellSouth, however, relied on the GeoLIT Plus report
9 (which is not corroborated) in its stubborn attempt to make out its case.

10

11 **Q. IS BELLSOUTH'S CLAIM THAT ANY CARRIER THAT**
12 **PROVIDES SOME SORT OF WHOLESALE SERVICE**
13 **SOMEWHERE IN TENNESSEE IS PRESUMED TO WHOLESALE**
14 **ON LOOP ROUTES VALID?**

15 A. No. In her testimony, Ms. Padgett counts a carrier as a wholesale provider
16 based on, for example, the carrier's own advertisements allegedly
17 indicating that the carrier offers wholesale services. *See* Padgett
18 Testimony at 13. BellSouth did not conduct any independent verification
19 of whether the carrier actually provides wholesale service and at what
20 customer location(s) the carrier makes wholesale service available.
21 Instead, even assuming that the carrier is a wholesale provider, BellSouth
22 goes one step further and incorrectly assumes that the carrier wholesales
23 loops at all customer locations where it is located. This is incorrect.

1 Xspedius is a good example Xspedius engages in wholesale sales in
2 Tennessee, but not over loops as defined by the FCC.

3

4 **Q. DID BELLSOUTH RELY ON XSPEDIUS'S DISCOVERY**
5 **REQUESTS IN CLAIMING THAT XSPEDIUS PROVIDES**
6 **WHOLESALE LOOP SERVICES?**

7 A. No. In her testimony, Ms. Padgett admitted that BellSouth ignored CLEC
8 data responses in determining whether to classify a carrier as a wholesale
9 loop provider See Padgett Direct at 13. Specifically, Ms. Padgett stated
10 that it disregarded certain CLEC data responses, including Xspedius's data
11 responses, due to BellSouth's belief that carriers had misinterpreted the
12 definition of a loop As an initial matter, Xspedius did not misinterpret the
13 definition of a loop A loop has a very specific legal definition, Xspedius
14 applied the definition that the FCC, the state commissions, and even
15 BellSouth have used for years. Furthermore, Xspedius knows better than
16 BellSouth whether Xspedius provides wholesale loops, in this case,
17 Xspedius has stated on the record that it does not provide wholesale loops
18 in Tennessee based on a traditional standard definition of a loop, and there
19 is no basis for disregarding its discovery responses.

20

21 **Q. DID BELLSOUTH APPLY THE NECESSARY ROUTE-SPECIFIC**
22 **ANALYSIS?**

1 A. No. As Mr. Ball states in his testimony, the FCC requires carriers to
2 provide information per end user location. As I stated above, BellSouth
3 bases its allegation that a carrier provides wholesale services at certain end
4 user locations based on its claim that the carrier provides some sort of
5 wholesale service in Tennessee. BellSouth has failed to apply the
6 necessary route-specific analysis and its direct wholesale case is therefore
7 baseless. BellSouth Exhibit SWP-1 is therefore inaccurate to the extent
8 that it lists Xspedius as a wholesale provider of loops. If the TRA were to
9 eliminate any loop routes based on this “ghost” competition, Tennessee
0 consumers living or working in the loop locations in question would be
1 denied the opportunity to purchase competitive services, frustrating the
2 intent of both state and federal statutes. Also lacking is any information
3 about whether the carrier has access to the entire location within the
4 building

16 **Q. CAN BELLSOUTH USE XSPEDIUS LOOPS TO MEET THE**
17 **TRIGGERS IF XSPEDIUS DOES NOT WHOLESALE OR SELF-**
18 **PROVIDE LOOPS AT THOSE CUSTOMER LOCATIONS?**

19 A Because Xspedius does not wholesale or self-provide any loops in
20 Tennessee, it cannot be relied upon to eliminate loops. BellSouth has ***
21 **BEGIN PROPRIETARY *****

22 . ***END

23 **PROPRIETARY ***** See Padgett Exhibit SWP-3 As I stated above,

1 Xspedius does not wholesale or self-provide loops at any location in
2 Tennessee.

3 In general, the TRA should be extremely demanding in applying
4 the FCC wholesale standards with respect to DS-1 loops. *See TRO*, para
5 338 Access to these loops is critical to my company's ability to provide
6 competitive services in Tennessee, and access to a robust wholesale
7 provider that meets the standards detailed in Mr. Ball's testimony is
8 critical.

9

10 **Q. HAS BELL SOUTH PROVIDED EVIDENCE DEMONSTRATING,**
11 **CONTRARY TO XSPEDIUS'S ASSERTION, THAT XSPEDIUS**
12 **PROVIDES WHOLESALE LOOPS?**

13 **A** No. First and foremost, there is simply no basis for BellSouth to disregard
14 Xspedius's discovery responses, which unambiguously indicates that
15 Xspedius does not offer wholesale loops in Tennessee

16 BellSouth's alleged "evidence" that Xspedius is willing to provide
17 wholesale loops is without merit and does not satisfy the evidentiary
18 standard required by the FCC's rules. To qualify for the wholesale
19 provisioning trigger, Xspedius must be willing to offer loops on a widely
20 available basis BellSouth has taken isolated statements about Xspedius's
21 products in general to claim that Xspedius provides wholesale loops, all
22 the while ignoring Xspedius's plainly stated response that it does not
23 provide wholesale loops.

1 In her testimony, Ms Padgett states that BellSouth derived
2 evidence of Xspedius's "willingness to wholesale loops" based on certain
3 statements contained in Xspedius's website. *See* Padgett Exhibit SWP-11
4 at 7-8. (Interestingly, in proceedings in other states, BellSouth has used
5 these same statements to support its unfounded claim that Xspedius
6 provides wholesale dedicated transport) For example, BellSouth claims
7 that the following statement is evidence of Xspedius's willingness to
8 wholesale loops: "Xspedius Communications offers superior products and
9 services to carrier customers in 36 markets in the United States." *Id.*
10 Nothing in this statement indicates, or even suggests, that Xspedius offers
11 or is willing to offer or is ready to offer loops to particular locations on a
12 wholesale basis at any capacity level. As another example, BellSouth
13 claims that Xspedius is willing to offer wholesale loops based on the
14 following statement: "Xspedius Fiber Group is a wholly owned subsidiary
15 of Xspedius Communications. Each metropolitan area is strategically
16 designed for optimal connectivity of major Business Districts, Local
17 Serving Offices, Carrier Hotels, and Interexchange Points-of-Presence
18 (POP) sites." *See* Padgett Exhibit SWP-12 at 8. Again, nothing in this
19 statement suggests that Xspedius currently offers – or even is willing to
20 offer – wholesale loops to particular locations at particular capacity levels
21 as required by the *TRO*. BellSouth is making a very large leap from the
22 statements in Xspedius's website to the detailed showing that it is required
23 to make in this proceeding

1 Furthermore, neither of these statements indicates the capacity at
2 which Xspedius allegedly provides such service. Each of BellSouth's
3 other alleged evidence from Xspedius's website suffers from similar
4 deficiencies. At bottom, there is simply no basis for BellSouth to question
5 Xspedius's discovery responses, which state that it does not provide
6 wholesale loops in Tennessee at any capacity level

7
8 **II. THE TRA SHOULD BE VERY CAUTIOUS IN APPLYING THE**
9 **POTENTIAL DEPLOYMENT CRITERIA**

10 **Q. WHY SHOULD THE TRA BE CAUTIOUS IN**
11
12 **APPLYING THE POTENTIAL DEPLOYMENT CRITERIA?**

13
14 A In his Direct Testimony, Dr. Banerjee advocates for eliminating loop and
15 transport routes based upon the so-called "potential deployment" of
16 facilities. The TRA should be extremely cautious in applying this test.
17 Where the TRA eliminates unbundled loop or transport based upon
18 potential deployment, there are no real-world facilities for CLECs to
19 purchase. End users and carriers that need access to these buildings or
20 routes will have nowhere to turn, and consumers will suffer by being
21 deprived of competitive alternatives. It is critical for CLECs such as
22 Xspedius to have access to cost-based facilities, just as BellSouth always
23 has access to its own facilities at cost. The TRA also should consider the
24 current limited access to capital of CLECs, and the great challenges that
25 CLECs had to overcome to build the network that is in fact in place today

1 – building access issues, high cost of capital, and in many cases,
2 bankruptcy. While certain BellSouth witnesses may try to convince the
3 TRA that carriers could have or should have built more network, it is very
4 telling that BellSouth did not make significant out-of-region investment to
5 build similar loop and transport facilities themselves during the same time
6 period. The TRA should therefore ensure that there are legitimate, real-
7 world alternative facilities available where elements are delisted.

8
9 **Q. WHY SHOULD TRANSITION ISSUES BE TREATED IN A**
10 **SEPARATE PHASE?**

11 **A.** By way of example, today Xspedius cannot obtain a cross-connect to
12 another carrier in the same timeframe that it can purchase one to
13 BellSouth. There are no arrangements in place today from BellSouth to
14 coordinate ordering with third party loop or transport carriers. In addition,
15 the current Xspedius business plan assumes access to loop and transport
16 UNEs, and such access should be grandfathered where facilities are
17 already in place. These are just a few of the transition issues that need to
18 be addressed by the TRA. Given the heavy amount of evidence to be
19 sifted through in this proceeding (not to mention the parallel switching
20 proceeding), a follow-on proceeding is critical to do justice to the many
21 transition issues. BellSouth's suggestion that facilities will still be offered
22 at "market rates" is totally inadequate. Padgett Testimony at 37. The
23 TRA, as in other contexts, must consider what rates are in fact appropriate

1 for delisted UNEs and what schedule will apply to get to those rates
2 Likewise, the suggestion of a 90-day transition is wholly inadequate given
3 the much longer transitions for switching and DSL providers. CLECs that
4 have invested heavily in Tennessee facilities deserve equal or better
5 treatment as other carriers, and the TRA should set aside a separate phase
6 of this proceeding to work through these many issues. All parties will be
7 in a much better position to discuss transition issues once we understand
8 the breadth and detail of any delisting arrived at by the TRA in this
9 proceeding.

10

11 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

12 A Yes.

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2004 a copy of the foregoing document was serviced on the parties of record, via US mail:

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